IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
	)	Case No. 0407017679
v.	)	
	)	
LURA PARAS,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Defendant Lura Paras ("Paras") appeared before this Court for a Non-Jury Trial on the charge of offensive touching on Thursday July 28, 2005. However, the victim, Andrea Wright ("Ms. Wright" or "victim"), was not present. The State attempted to proceed to trial, and Defendant made an oral motion for dismissal. Following oral argument by Defendant and the State, this Court ordered briefing limited to the issue of whether the victim is a necessary witness for trial. This is the Court's final order.

THE FACTS

The Court finds the following facts as relevant. The State will likely present direct evidence in the form of eyewitness testimony from Bernadette Doubet ("Doubet") that on July 14, 2005, while inside of the New Castle County Courthouse near courtroom 5C, she saw Defendant strike Ms. Wright in the face. As a result, Defendant was charged with one count of Offensive Touching in violation of 11 Del. C. §601.

PRINCIPLES OF LAW

The elements of a crime may be proven using only circumstantial evidence.[1] The burden is on the State to prove each element of an offense beyond a reasonable doubt.[2] According to 11 Del.C. §601(a)(1), the three elements of offensive touching are: (1) an intentional touching of another; (2) with a member of one's body or any instrument; (3) knowing that such intentional touching is likely to create offense or alarm to another person. Furthermore, 11 Del.C. §231(b) provides: a person acts "knowingly" with respect to an element of an offense when: (1) If the element involves the nature of the person's conduct or attendant circumstances, the person is aware that the conduct is of that nature or that such circumstances exist; and (2) If the element involves a result of the person's conduct, the person is aware that it is practically certain that the conduct will cause that result.

DISCUSSION

I. The victim is not a necessary witness under 11 Del. C. § 601 and the victim's state of mind bears no weight on the State's decision to prosecute Defendant where the victim is not present to testify.

Defendant first argues, "The statute contains the requirement that the victim be present for trial as the Court must consider a view of all the circumstances, including the victim's state of mind, in order to convict a defendant beyond a reasonable doubt of offensive touching under 11 Del. C. § 601."[3] Defendant cites *Hassan v. State*[4] and further argues, "As discussed in *Hassan*, an accepted requirement for a conviction of offensive touching is 'that it caused the recipient, in this case [the victim] offense or

[1] *Wei v. State*, 571 A.2d 788, **4, (Del. Supr. 1989).
[2] 11 Del.C. §301(b).
[3] *Defendant's Opening Brief*, at 2.
[4] *Hassan v. State,* 1999 WL 1427716 (Del.Super.).

alarm at the touching.'"[5] However this Court finds that the decision in *Hassan* does not suggest what Defendant is arguing. Defendant uses a portion of *Hassan*, not a part of Judge Herlihy's decision, to support his argument. The excerpt cited is merely a restatement of the record of the lower court's transcript, and should not be misinterpreted as one of Judge Herlihy's findings.[6] To say that the "*Hassan* court accepted the lower court's fact findings" by taking issue only with the absence of a finding that defendant knew his touching was likely to cause offense or alarm, is both inaccurate and illogical. The reversal of a lower court decision for failure to find, as a fact, a necessary element of a crime does not necessarily mean that any or all other extraneous findings of fact by the lower court are necessary. Rather, in *Hassan*, Judge Herlihy ruled that the case was reviewable on *certiorari* because the trial court erroniously permitted the defendant in that case to be convicted of offensive touching without proving, beyond a reasonable doubt, that the defendant knew that his intentional touching of another was likely to cause offense or alarm.[7]

Defendant further argues, based on *Blachowicz*,[8] that "[T]he relevant principal here is that 'the question whether a person knows that he is likely to cause offense or alarm necessarily entails a view of all of the circumstances including the victim's state of mind.'"[9] However, it is possible and permissible for the victim's state of mind to be examined without that mind being present. Defendant further suggests that the *Delaware Criminal Code with Commentary* supports its position, "because knowing that the

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[5] *Id*.
[6] The State, in its Answering Brief, argues that the excerpt is *dicta*. Black's Law Dictionary defines *judicial dictum* as: an opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision. Black's Law Dictionary, (8th ed. 2004). It should be noted that the excerpt from *Hassan* is not even *dictum* because it is a restatement of the findings of the court below, and not a part of the *Hassan* decision.
[7] *See Hassan v.State*, 1999 WL 1427716.
[8] *Blachowicz v. State,* 1987 WL 8662 (Del.Super).
[9] *Defendant's Reply Brief*, at 8.

touching would cause offense and alarm is inseparable from the fact that the victim must be offended and alarmed."[10] In fact, the relevant section Defendant relies on in *The Commentary* provides:

> "Section 601 creates the simplest of criminal offenses involving bodily contact of this Criminal Code. The material elements of the offenses are intentional touching of another person, either with a member of the actor's body or an instrument, and ***knowledge*** that the touching is likely to cause offense to the victim." (emphasis added).[11]

11 Del.C. §601 requires the State to prove, beyond a reasonable doubt, that the defendant knew that his intentional touching would likely cause offense to another person. This does not logically require, as Defendant argues, that the offense or alarm of the victim likewise be established simply because the last words of the statute are "to such other person."[12] This simply means that no conviction is possible under 11 Del.C. §601 where a Defendant offensively touches anything other than a person, hence, "*Title 11: Subchapter II. Offenses Against* ***the Person*****."** (emphasis added).

Defendant further argues that forgoing the requirement to establish that the victim was offended or alarmed would punish Defendant for "what is essentially a *thought crime*."[13] However, this is assuming that such a requirement exists, which it does not, and the case law that Defendant cites does not sufficiently support such a conclusion. If W observes A approach and strike B, there is no reason why W could not testify against A.[14] This is not to say that victims of offensive touching will be *prevented* or *prohibited*

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[10] *Defendant's Reply Brief*, at 11, citing *Delaware Criminal Code with Commentary*(1973) at 162.
[11] *Delaware Criminal Code with Commentary* (1973), at 162.
[12] 11 Del.C. § 601
[13] *Defendant's Reply Brief*, p. 12
[14] *Wei v. State*, 571 A.2d 788, **4, (Del. Supr. 1989). (emphasizing, "Circumstantial evidence alone may be used to prove the evidence of a crime." *Citing Davis v. State*, Del.Supr., 453 A.2d 802, 803 (1982)).

from testifying, just that they are *not necessary* to prove any of the elements of 11 Del.C. §601 beyond a reasonable doubt.[15]

II. The victim's absence at trial does not create a conclusive presumption, eliminate affirmative defenses, nor does it compel the defendant to testify.

Defendant argues, "The practical effect of allowing a witness to testify absent the victim creates a conclusive presumption with respect to the fact that a person was offensively touched. Conclusive presumptions are prohibited by 11 Del. C. §306."[16] In response, the State correctly cites the Supreme Court's decision in *Evans v. State*, "There are two types of evidence from which a [fact-finder] may properly find the facts of the case. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence; that is, the proof of facts, or circumstances from which the existence or nonexistence of other facts may reasonably be inferred." [17] If a witness testifies against a defendant without any testimony from the victim, assuming Defendant's hypothetical case where it is questionable if there even *is* a victim to begin with, then "Defendant *may* testify and make such claim on the stand."[18]

The State correctly asserts that it is *still* required to prove "each and every element" beyond a reasonable doubt.[19] Further, Defendant has *the right* to take the stand, and if she elects not to, this will not, as Defendant suggests, shift the burden to the defense. Defendant can disprove that there even was a victim because "the Defendant may cross examine the State's witness at trial."[20]

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[15] Obviously, the State's strongest case against a defendant will include corroborating testimony from the victim and witness.
[16] *Defendant's Reply Brief,* at 13.
[17] *Evans v. State,* 620 A.2d 857, (Del. 1992).
[18] *State's Answering Brief,* at 10.
[19] *Id.*
[20] *Id.*

Of course, Defendant may not be able to cross examine the victim as to their statements, conduct and subjective state of mind, however, the subjective state of mind of the victim is simply irrelevant under 11 Del. C. §601. The State correctly points out that "As for the conduct of the victim, the Defendant may inquire from any other witness what their observations were without the necessity of having the victim present at trial."[21] Thus, the State is correct in that the victim's absence neither presents a conclusive presumption nor does it shift the State's burden to Defendant.

The absence of the victim does not compel Defendant to testify. As previously stated, Defendant may exercise her *right* to choose whether or not to testify. Defense counsel may cross-examine the State's witness and challenge the observations made by that witness. As the State argues, "If, on the other hand, the defendant would like to explain her actions she certainly has the right to testify."[22] Affirmative defenses are not eliminated because Defendant can still raise them, and if the victim is not present for rebuttal, the State would still have to rely on the witness' testimony to prove the elements of the crime beyond a reasonable doubt.

III. Allowing the State to proceed to trial in the absence of the alleged victim is not fundamentally unfair and does not violate Defendant's Due Process rights under the State and Federal Constitutions.

Using *Matthews v. Eldridge* to bolster its argument, Defendant claims that her "liberty interests outweigh the State's prosecutorial interests,"[23] thus the victim should be required to appear for trial, and that to rule otherwise would be in violation of her Due Process rights. Again, the State correctly replies that the Defendant is guaranteed fundamental fairness and her due process rights are preserved because "it remains the

[21] *Id.*
[22] *Id.* at 12
[23] *Defendant's Reply Brief*, at 17.

State's burden to prove each and every element of a criminal offense beyond a reasonable doubt."[24] Defendant may still cross-examine the witness, has the ability to testify to rebut the evidence against her, and can argue the facts of the case. Thus, Defendant's due process rights remain in tact and no fundamental unfairness exists if the State moves forward to trial without the victim being present.

CONCLUSION

For the above stated reasons, the victim's presence at trial is not necessary for the State to prosecute Defendant under 11 Del. C. §601 for Offensive Touching.

ORDER

Therefore, Defendant's Motion to Dismiss is hereby DENIED.

SO ORDERED this _____ day of _____, 2006.

_____
Joseph F. Flickinger III
Judge

[24] *State's Answering Brief*, at 13.